FCC 94-270

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
	)	
Regulatory Treatment of Mobile Services	)	

FOURTH REPORT AND ORDER

Adopted: October 20, 1994; Released: November 18, 1994

By the Commission: Commissioners Quello and Barrett issuing separate statements.

I. INTRODUCTION

1. On July 18, 1994, the Commission adopted a *Second Further Notice of Proposed Rule Making* [1] in which we sought comment on whether we should consider certain non-equity relationships to be attributable interests for purposes of applying the 40 MHz limitation on broadband Personal Communications Service (PCS) spectrum,[2] the PCS-cellular cross-ownership rules,[3] and a more general Commercial Mobile Radio Service

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[1] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Further Notice of Proposed Rule Making*, 9 FCC Rcd 4400 (1994) (*Second Further Notice*).

[2] *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700 (1993) (*Broadband PCS Order*), *recon.*, Memorandum Opinion and Order, FCC 94-144, released June 13, 1994 (*Broadband PCS Reconsideration Order*) *further recon.*, Third Memorandum Opinion and Order, FCC 94-265, released October 19, 1994 (Broadband PCS Further Reconsideration Order).

[3] *Broadband PCS Reconsideration Order*, at para. 98-140.

(CMRS) spectrum cap.[4] We also requested comment on whether any attribution rules we might adopt in this proceeding should apply differently depending on whether the applicant or licensee involved is a designated entity.[5]

2. Specifically, the *Second Further Notice* asked whether resale agreements, management contracts, and joint marketing arrangements that do not confer *de facto* control on a party should be considered attributable because these interests may affect the incentive or ability of PCS and other CMRS licensees to compete vigorously in the marketplace or because they may affect the number of effective competing providers or the independence of pricing decisions by service providers.[6] The twenty parties filing comments in response to the *Second Further Notice*, and the eleven entities filing reply comments, are listed in the attached Appendices. In addition, we received *ex parte* comments from the Department of Justice and Pacific Bell and Pacific Bell Mobile Services. Since the close of the comment period, the Commission has released the *Third Report and Order* [7] in this docket. In that Order, we adopted a spectrum cap of 45 MHz on the combined ownership of broadband PCS, cellular radio, and Specialized Mobile Radio (SMR) licenses that are classified as CMRS. This spectrum cap is in addition to the existing 40 MHz cap on broadband PCS ownership and the PCS-cellular cross-ownership rules. The *Third Report and Order* also conformed the rules relating to station management and control for CMRS providers and stated that we would address whether standards regarding indicia of control in connection with CMRS management contracts should be further conformed or modified in the context of our examination of whether to attribute non-controlling management contracts.[8]

3. We want to ensure that the significant changes that will be occurring in wireless services produce a robustly competitive market with a diversity of efficient providers serving a variety of consumer needs. The value assigned to PCS licenses in our recent narrowband auction furnishes further evidence that the spectrum available for wireless services is limited and that entry into the mobile wireless service market will not be

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[4] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 252, Further Notice of Proposed Rule Making, 9 FCC Rcd 2863 (1994) (*Spectrum Cap Notice*).

[5] Small businesses, rural telephone companies, and businesses owned by members of minority groups or women (or both) are collectively referred to as "designated entities." *See* 47 C.F.R. §§ 1.2110, 24.720.

[6] *Second Further Notice,* at para. 5.

[7] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, FCC 94-212, released Sept. 23, 1994 (*Third Report and Order*).

[8] *Third Report and Order*, at para. 226.

unlimited so that safeguards are needed to maximize competition among those who are granted licenses. To that end, the Commission has taken steps to prevent excessive aggregation of spectrum through our various spectrum caps and cross-ownership rules. The goal of these limitations is to ensure that a single entity will not have the ability to influence or control a large portion of the available mobile wireless spectrum and thereby undermine competitive pricing for wireless services. We conclude that for the same reasons that we adopted the spectrum caps, we will attribute towards the spectrum limitations management agreements and joint marketing agreements between licensees that confer the ability to determine or significantly influence price or service offerings. While such arrangements are considered attributable, they will not be prohibited by our rules so long as those with attributable interests remain below the various spectrum thresholds after considering all attributable spectrum.

4. We believe that management agreements, resale, and joint marketing arrangements can enhance the competitiveness of wireless service providers. Management agreements have been used in the SMR industry and have proven to be beneficial to the introduction of new technology such as trunked systems and new wide area systems. In certain contexts, however, we believe they may also be used to facilitate the exercise of market power and produce anticompetitive results.

5. In this Order, we are concerned with the effects on competition from non-equity arrangements. In the current wireless marketplace, we believe that joint marketing arrangements such as MobiLink and Cellular One can be beneficial to consumers. These types of arrangements facilitate roaming and brand identity without conferring the ability to set or significantly influence the price or service offerings of individual licensees. We believe, however, that there may be other joint marketing arrangements that may confer the ability to significantly influence price and service offerings. In these cases, we would consider those arrangements to be attributable and would be prohibited if a party to the agreement exceeded the applicable caps.

6. We are also concerned about the effects attributing such arrangements might have on the competitiveness of designated entities. We do not believe that there is a shortage of qualified entrepreneurs or managers for wireless systems. Therefore, we do not believe that considering management contracts attributable interests for purposes of spectrum caps will harm competition or efficiency, nor will it harm the ability of designated entities to find suitable expertise should they wish to do so. We expect that investor/manager agreements are one of many alternatives available to designated entities and do not believe that treating management agreements as attributable for designated entities in exactly the same manner for spectrum cap purposes as for other entities will hamper the competitiveness of designated entities. This does not mean, however, that these management agreements will be deemed

"attributable" for purposes of the revenue thresholds in the entrepreneur's blocks.[9] Additionally, we note that this decision in no way restricts designated entities (or other licensees) from entering into management or joint marketing agreements with entities with no attributable interests in the same market.

7. For the reasons stated below, we conclude that it is not in the public interest to treat resale agreements as attributable interests for the purpose of applying CMRS multiple- and cross-ownership rules. We do find, however, that joint marketing arrangements, as defined below, between competitors in the same geographic area and certain management agreements should be treated as attributable interests for purposes of spectrum caps and pursuant to the rules and criteria we adopt in this Order.

II. DISCUSSION

A. Resale Agreements

8. In the *Second Further Notice*, we tentatively concluded that resale agreements should not be attributable, and the record strongly supports that initial finding. AMSC, RCA, Motorola, McCaw and other commenters agree with the Commission that a reseller cannot exercise effective control of the spectrum used to provide its service or reduce the amount of service provided over that spectrum.[10] GTE argues that resale activities can serve as a source of competition in many service and geographic markets.[11] AMTA agrees that resale arrangements increase the number of parties offering service in a marketplace without giving the additional parties any rights which could lead to an unauthorized transfer of control.[12] Pacific Bell concurs with this position and points out that in California there are four resellers with more than 20,000 customers each, approximately five to seven resellers with 4,000 to 10,000 subscribers and over twenty resellers with 1,000 to 3,000 subscribers. Pacific Bell contends that parties interested in both cellular resale and direct provision of PCS services would decline to participate in the resale business if doing so would limit their flexibility in pursuing PCS licenses. The result, Pacific Bell states, would be fewer resellers in competition with each other and with facilities-based cellular providers.[13]

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[9] *See* Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, FCC 94-178, released July 15, 1994, *recon.* Fifth Memorandum Opinion and Order, FCC 94-285, adopted Nov. 10, 1994.

[10] *See, e.g.,* AMSC Comments at 3; RCA Comments at 7; Motorola Comments at 9-10; McCaw Comments at 3-4.

[11] GTE Comments at 9.

[12] AMTA Comments at 10.

[13] Pacific Bell Comments at 2-3.

9. NCRA cites Commission rule making proceedings on resale and shared use in which the Commission recognizes the benefits of unrestricted resale activity and acknowledges that its current resale policy furthers brand name competition, service availability, and the efficient allocation of spectrum resources.[14] CSI maintains that cellular resale is dependent on the management and pricing decisions of other parties -- namely, the licensed cellular carriers. It asserts that the resellers' lack of power over facilities, services, and pricing has frustrated the cellular resellers' ability to enhance the services they would like to provide.[15] Columbia PCS, in contrast to the other commenting parties, urges the Commission to establish some limit on the amount of capacity available for a single reseller. It is concerned that an entity otherwise ineligible to obtain additional spectrum in a market could obtain an exclusive right to lease the entire capacity of a licensee. Columbia claims that such an arrangement could facilitate warehousing of spectrum and could substantially reduce competition in a given market.

10. As stated above, we reached the tentative conclusion in the *Second Further Notice* that resale agreements should not be attributable for the purpose of applying spectrum caps. This initial finding was based on the inability of resellers to exercise substantial influence or effective control over the spectrum on which they provide service or to reduce the amount of service provided over the spectrum. We conclude that our tentative finding was correct. There is no evidence in the record upon which we could conclude that resale arrangements are likely to compromise the ability of CMRS carriers to compete in the wireless marketplace. The reseller does not have the capability to control the resold spectrum and the reseller has no power to dictate what services are offered by the licensee or the prices at which these services will be provided. Moreover, as many commenting parties indicate, resale agreements increase competition in the marketplace rather than to lessen it. Parties have suggested that PCS licensees may wish to resell cellular service while they are building their PCS network in order to provide service to the public expeditiously.[16] We believe that resale activities are in the public interest because they expand the availability of communications services, promote the efficient use of spectrum, and enhance competition.

11. We also conclude that Columbia's concern that an entity might obtain exclusive right to lease the entire capacity of a licensee is unfounded because of the common carrier status of CMRS licensees. An exclusive capacity arrangement would not be permitted if it violates Section 202 of the Communications Act of 1934, as amended.[17] Section 202

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[14] NCRA Comments at 5, note 12.

[15] CSI Comments at 2.

[16] *See* In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services , CC Docket No. 94-54, *Notice of Proposed Rule Making and Notice of Inquiry,* FCC 94-145, released July 1, 1994 at n. 251.

[17] 47 U.S.C. §202.

provides that a common carrier must offer its facilities to the public on a basis that is not unjustly or unreasonably discriminatory. In such a situation, the carrier would have the burden of demonstrating that any such exclusive capacity arrangement does not unreasonably impede its ability to meet its common carriage obligations under Title II of the Act. While we recognize that CMRS providers may offer individualized or customized service offerings, we have stated our intention previously that if such offerings meet the definition of CMRS, they will be classified and regulated as CMRS.[18] The CMRS definition narrowly restricts the types of services that are not deemed to be available to the public and, consequently not common carrier services. Specifically, under the public availability prong of the CMRS definition, a service is considered not available to the public only if it is used for a licensee's internal use or Commission rules limit eligibility to specified user groups.[19] A customized or individualized service offering would meet the public availability prong of the CMRS definition and would be treated as a common carrier service if it meets the other prongs of the CMRS definition. Thus, any grandfathered private mobile radio service (PMRS) carrier who has entered into such exclusive capacity arrangements in the past will be required to satisfy common carrier standards at the end of the transition period. Similarly, carriers who may enter into such arrangements in the future will be subject to common carrier requirements.

B. Management Agreements

12. In the *Second Further Notice*, we expressed concern that non-equity relationships that do not rise to the level of *de facto* control nevertheless might merit attribution because they could raise anticompetitive concerns where the manager or marketer acquires special proprietary information about a licensee's customer base and pricing information or has significant influence on the licensee's competitive conduct. We sought comment on whether access to such information, if used in an anticompetitive manner, could lead to a reduction in choices for the consumer of communications services.

13. All but two of the commenters contend that making management agreements attributable interests is inappropriate and contrary to the public interest. BellSouth argues that control should be the sole factor for determining attribution of non-equity relationships and that any agreement that confers *de facto* or *de jure* control upon a party other than a

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[18] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, in GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1439 n. 130 (1994) (*Second Report and Order*), *recon. pending.*

[19] *Second Report and Order,* 9 FCC Rcd at 1441, para. 68. A commercial mobile radio service is one that is 1) provided for profit, 2) interconnected to the public switched network, and 3) available to the public. *Id.* at 1425-1442. *See also* Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

licensee should be considered an attributable interest.[20] Simron, Nextel, DialPage, and other representatives of the SMR industry maintain that management agreements have been used in that industry for years and have contributed to its growth and success. Motorola also contends that management agreements in the SMR context have served to increase competition and diversity in the mobile services marketplace by providing a source of consultation, advice, and expertise to inexperienced licensees.[21] Entities representing the SMR industry are particularly concerned that such a change in Commission policy toward management agreements could injure numerous licensees that have relied on existing policies.

14. Several commenters point out that management agreements are likely to play a critical role in ensuring the successful launch of PCS and other services that will be offered by designated entities. They maintain that adoption of attribution rules for non-equity interests would have a chilling effect on opportunities for designated entities to enter the wireless communications business.[22] LCC asserts that designated entity participants need the broadest possible access to expertise and resources in order to compete effectively.[23] Pacific Bell alleges that competition will suffer if the expertise of experienced operators will no longer be available to less experienced licensees.[24] Moreover, argues Southwestern Bell, making management agreements attributable would have a negative impact on designated entities by foreclosing to other companies any significant management interest in the licenses held by designated entities.[25]

15. CTIA maintains that attribution rules for non-equity interests are not necessary because the Commission has already provided sufficient restrictions and conditions to ensure that no CMRS provider will exert market power by controlling large amounts of spectrum in a given geographic market, and to ensure that designated entities will be the real party in interest and not a front or sham operation.[26] Similarly, AMTA argues that existing rules and regulations are already in place which give the Commission the authority to halt

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[20] BellSouth Reply Comments at 3.

[21] Motorola Comments at 6-7.

[22] *See, e.g.*, NYNEX Comments at 2; PlusCom Comments at 2; DialPage Comments at 4; GTE Comments at 6; McCaw Comments at 7.

[23] LCC Comments at 6.

[24] Pacific Bell Comments at 5.

[25] Southwestern Bell Comments at 7.

[26] CTIA Comments at 4.

any anticompetitive behavior.[27] Pacific Bell claims that the licensee has every incentive to scrutinize carefully any management agreement it enters into to ensure that the agreement will put it in the best competitive position possible. It also asserts that the Commission should not get involved in the "micromanagement" of business by defining what constitutes a management agreement. It maintains that engaging in this type of activity would be an administrative "nightmare" and would consume Commission resources without any real benefit.[28]

16. PCC does not support or oppose attribution with respect to non-equity relationships. Rather, it urges the Commission to refine the *Intermountain Microwave* control test.[29] In its view, the Commission cannot determine whether management agreements should be found to create attributable interests for application of any PCS or CMRS spectrum cap until it defines the types of management agreements that comply with the *Intermountain Microwave* criteria. PCC asserts that the communications environment of today is radically different than that of 1963 when *Intermountain Microwave* was decided. Because of today's complex technology, PCC maintains that the level of expertise and training required to construct, operate, and maintain such communications systems is much greater than in the past, and that the business and financial acumen needed to manage these systems has increased greatly. PCC contends that in this environment, the Commission should adopt control and real-party-in-interest criteria that are consistent with existing communications business practices.[30] Pacific Bell also argues that CMRS entrants need a clear understanding of the scope of the powers that may be exercised under management

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[27] AMTA Comments at 4.

[28] Pacific Bell Comments at 4, 6.

[29] PCC Comments at 4-8, citing *Intermountain Microwave*, 24 Rad. Reg. 7 (P&F) 983 (1963).

[30] PCC Comments at 3. In the context of management agreements, PCC asserts that adoption of certain criteria would eliminate the complex, time-consuming, fact-specific litigation now common in real-party-in-interest litigation. PCC suggests, for example, that we require the inclusion of provisions in management agreements that specify: that the licensee may remove the management company, without penalty, upon substantial misconduct or uncorrected violation of Commission rules; that the licensee must review and sign all applications, amendments, and similar filings with the Commission, and may require any changes it deems desirable in such documents; that the licensee may terminate the management contract within 10 years of its effective date or last renewal, without penalty; and that the management company may not hold a veto power over the licensee's powers under the agreement. PCC reasons that if the manager holds a *bona fide* ownership interest in the licensee, it should be limited to whatever power arises from its ownership interest and not receive additional powers of control over the licensee through the management agreement.

contracts consistent with the Commission's Rules.[31] Likewise, NABOB supports PCC's "safe harbor" guidelines, contending that guidance is necessary before entities begin entering into management agreements.[32] PRTC states that the control test under *Intermountain* should be applied in light of new technological developments and in the context of today's business environment.[33] On the other hand, Sprint disagrees that refinement of the *Intermountain Microwave* test is warranted. It argues that the *Intermountain Microwave* criteria provides adequate guidance to licensees concerning the circumstances under which the Commission would find that a *de facto* transfer of control has occurred.[34]

17. Columbia and the Department of Justice urge the Commission to consider non-equity interests as attributable for spectrum cap purposes. Columbia asserts that the Commission should adopt clearer guidelines regarding all forms of non-equity relationships and should narrowly define permissible management contracts to allow subcontracting arrangements for any specific functional task (*e.g.*, construction). Columbia argues that the Commission should not allow parties to enter into management contracts that are tantamount to a general contractor role because, in its view, such contracts would result in a *de facto* transfer of control. Although Columbia's plan would permit subcontractor arrangements, it would also make these arrangements attributable interests that would apply to designated entities and non-designated entities alike. In addition, Columbia contends that the Commission should require such subcontracts to be priced at fair market value. *Ex parte* comments from the Department of Justice express a similar concern. The DOJ is concerned that such non-equity relationships might raise competitive concerns, specifically where one of the parties to such agreements has the power to determine or affect significantly prices or service output for two or more CMRS licensees in the same geographic market. In such situations, the DOJ contends that the management firm effectively controls the competitive capabilities of both of those licensees, and thus can significantly constrain the scope of

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[31] Pacific Bell Reply Comments at 3.

[32] NABOB Reply Comments at 3-5.

[33] PRTC Reply Comments at 4. PRTC urges the Commission to clarify that "virtual network arrangements" would not result in interest attribution. It explains that, because of the expense involved, many new PCS/CMRS providers may seek to fit within existing networks rather than build their own stand-alone networks. PRTC explains that in such situations, the licensees may not physically control the overall network, but will control the use of their spectrum and will be able to activate and deactivate the customer premises equipment of customers. Moreover, it claims that the network manager would not have access to customer lists or similar competitive information. In light of the limited information provided by PRTC concerning these type of arrangements, and because the *Second Further Notice* did not seek comment on this matter, we are not able to address PRTC's concern at this time.

[34] Sprint Reply Comments at 6-7.

competition between them. It maintains that the potential for reduced competition from an agreement which allows a firm to determine or significantly affect prices or service offerings for two or more CMRS licensees is obvious when the agreement involves multiple licensees within a particular geographic market. Such an agreement could effectively create a single economic entity and virtually eliminate any possibility of meaningful competition in that market between the licensees subject to the agreement. [35] In response, Pacific Bell argues that the standard DOJ proposes is so vague that it may have the opposite effect and deter entities from entering into pro-competitive agreements. It urges the Commission to provide specific criteria regarding what provisions of an agreement constitute a substantial influence over prices or services.[36]

18. In the *Second Further Notice,* we acknowledged that any agreement that confers on a party other than the licensee *de facto* control over a Commission-licensed facility would be considered an attributable interest and would violate Section 310(d) of the Act if the agreement has not been disclosed to and approved by the Commission in advance of consummation. We indicated that issues of *de facto* control are determined pursuant to existing precedent, citing the *Intermountain Microwave* decision.[37] In the *Third Report and Order* we stated that we would clarify our interpretation of *de facto* control for reclassified CMRS providers.[38]

19. We asked in the *Second Further Notice* that commenters address whether there are relationships that do not rise to the level of control that should be considered attributable interests because they may affect competition. Virtually all the commenters approached the issue as one of control and not whether adopting attribution rules in the absence of *de facto* control would deter anticompetitive conduct. *Ex parte* comments filed by the Department of Justice, however, did address the issue of treating non-equity agreements as attributable interests. Notwithstanding the views expressed by the majority of commenters, and because they did not address our stated competitive concerns, we have concluded, for the reasons discussed below and based upon our concerns about possible anticompetitive behavior, that it is in the public interest to make certain management agreements between or among competitors in the same geographic area subject to our CMRS multiple-ownership and cross-ownership rules.

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[35] DOJ *Ex Parte* Comments at 4.

[36] Pacific Bell Ex Parte Comments at 2.

[37] *Second Further Notice*, at para. 5. *See also id.* at para. 5, note 7 (citation of authorities).

[38] *Third Report and Order*, at para 226.

1. Criteria for *de facto* transfers of control

20. We recognize that in the past, different criteria have been used to determine whether a private carrier or common carrier has relinquished control of its facilities. In 1985, the Private Radio Bureau issued an opinion addressing five petitions to dismiss several SMRS applications filed by Motorola. The petitions were based on allegations that Motorola, through the use of management contracts, had assumed *de facto* control of SMR systems licensed to Comven, Inc. in violation of Section 310(d) of the Communications Act. The Bureau determined that licensees may hire entities to manage their SMR systems, provided that the licensees do not "contract away their control of the system."

> This means that a licensee must have a bona fide proprietary interest in its system and that it exercise the supervision over the system that it requires consistent with its status as licensee.[39]

In the Common Carrier Bureau, the guidelines established in the *Intermountain Microwave* decision have been used to determine who controls a common carrier licensee.[40] Over the years, we have relied on the six factors addressed in the *Intermountain Microwave* decision to determine in particular cases whether an unauthorized transfer of control has taken place in violation of Section 310(d) of the Communications Act.[41] In each case, we have found

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[39] Applications of Motorola, Inc., File Nos. 507505 *et al.*, issued July 30, 1985 at para. 25. *See also Public Notice*, 64 RR 2d 840 (PRB 1988) restating guidelines.

[40] The Court of Appeals recently remanded two proceedings relating to determining issues of control. We note, however, that in handing down these two decisions, the Court was concerned not with the validity of the *Intermountain Microwave* criteria, but rather with the proper application of those criteria. *See* Telephone Data Systems, Inc. v. FCC, 19 F. 3d 655 (D.C. Cir. 1994), *vacating and remanding* La Star Cellular Telephone Co., 7 FCC Rcd 3762 (1992) and Telephone Data Systems, Inc. v. FCC, 19 F. 3d 42 (D.C. Cir. 1994), *vacating and remanding* Ellis Thompson Corp., 7 FCC Rcd 3932 (1992). On remand the Commission will be deciding how the existing *Intermountain Microwave* factors are to be applied in particular cases.

[41] The six factors are: (1) Does the licensee have unfettered use of all facilities and equipment? (2) Who controls daily operation? (3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission? (4) Who is in charge of employment, supervision, and dismissal of personnel? (5) Who is in charge of the payment of financing obligations, including expenses arising out of operating? and (6) Who receives monies and profits from the operation of the facilities? *Intermountain Microwave, supra*, note 29 at 984. *See also* Cellular Control Notice, 1 FCC Rcd 3 (1986); Public Notice, Common Carrier Public Mobile Services Information, "Mobile Services Division Releases Guidance Regarding Questions of Real Part in Interest and Transfers of Control for

that the criteria are sufficient to enable us to review management contract terms (along with other arrangements such as options and rights of first refusal), to determine control issues and to furnish meaningful guidance to licensees in negotiating such agreements. Columbia, PCC, Pacific Bell and NABOB all suggest that the criteria established in *Intermountain Microwave* are no longer sufficient for determining whether a licensee has relinquished control of its licensed facilities. We, however, agree with Sprint, CTIA, BellSouth and PlusCom, that the guidelines set forth in *Intermountain Microwave* and its progeny provide workable standards for the Commission and licensees to use in assessing control issues. We believe that these established guidelines should apply to all CMRS providers, including reclassified PMRS carriers upon expiration of the transition period. Accordingly, we will continue to use the control factors set forth in the *Intermountain* decision when considering questions of *de facto* control of a CMRS licensee in particular cases. Extending these control criteria to all CMRS providers will promote regulatory consistency and conformity among these licensees. Although a few of the commenters suggest that we revise the *Intermountain* control factors, we decline to do so here. We also reject PCC's proposal to adopt certain"safe harbor" guidelines. Several of PCC's suggested criteria are concerned with contractual terms that are more appropriately negotiated by the parties in their agreements and not imposed by the Commission.

21. In the *Second Further Notice*, we also sought comment on how non-equity relationships should be construed in the context of determining whether the designated entity has *de facto* and *de jure* control of the licensee.[42] We received no comments addressing this matter in this proceeding. However, the issue of designated entity control was addressed upon reconsideration of our designated entity auction rules for broadband PCS adopted in the Fifth Report and Order in PP Docket No. 93-253.[43] Generally, where CMRS licenses are held by designated entities, such non-equity relationships with non-designated entities will be construed under the factors set forth in *Intermountain* and its progeny.

2. Attribution rules

22. An overriding purpose of the Omnibus Budget Reconciliation Act of 1993 is to promote the establishment of a more diverse and competitive communications marketplace.[44]

Cellular Applications," Report No. CL-93-141, Sept. 22, 1993; Public Notice, Common Carrier Public Mobile Services Information, "Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications in Markets Beyond Top 120," Report No. CL-87-1, Oct. 2, 1986.

[42] *Second Further Notice* at para. 4.

[43] *See* n. 9 *supra.*

[44] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

We are concerned that such diversity may not exist when a single entity manages other licensees in the same geographic areas even when such entity does not "control" the licenses that it manages.[45] We agree with Columbia that a cellular company or a 30 MHz PCS licensee in a particular market that manages the operations of competing entities in that same market creates an opportunity for anticompetitive conduct to flourish. That management company may have access to sensitive information such as customer billing and collection accounts, customer lists, licensee pricing or other business plans or marketing strategies which can be used to impede competition in that market. In addition, we agree with the DOJ that the potential for reduced competition exists in an agreement which allows a management firm to determine or significantly influence prices or service offerings for two or more CMRS licensees.

23. These concerns apply as well to in-market management arrangements that may be made with designated entities. Several commenters have noted that designated entities are more likely to need the services of experienced CMRS providers, a point that we do not dispute. The anticompetitive concerns raised by management contracts, however, are equally applicable to all PCS spectrum blocks.[46] We believe that the benefits designated entities can receive from experienced managers can be achieved in full, without damage to the competitive balance of the market, if that manager is not a competitor in the same market. While we agree with NYNEX that management agreements could be structured to contain strict safeguards to prevent disclosure of sensitive information, the examination of various types of management contracts to ensure compliance would prevent the staff from expeditiously licensing PCS facilities. We believe that administrative efficiency requires adoption of a rule that provides a degree of certainty to applicants and licensees regarding the agreements that will be attributable. As described below, a designated entity may enter into an operations agreement with a CMRS licensee or a manager that has an attributable interest in another CMRS licensee in the same geographic area without having the interest imputed to such manager or licensee provided the manager does not determine (1) the nature or types of services offered by such licensee; (2) the terms upon which such services are offered; or (3) the prices charged for such services.

24. Our examination of the CMRS marketplace, and our evaluation of the record

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[45] We consider two entities to be in the same geographic area when there is a 10 percent or greater population overlap of their respective licensed service areas. *See* 47 C.F.R. §§ 20.06, 24.204.

[46] Some commenters urge the Commission not to apply any attribution rules to specific classes of designated entities should the Commission adopt such attribution rules generally. For example, ROMGAT proposes that only 20 percent of the spectrum licensed to a qualified woman and/or minority-owned business should be attributable for spectrum cap purposes. ROMGAT Reply Comments at 7. RCA proposes that rural telephone companies be exempt from any rules that attribute non-equity relationships. RCA Comments at 9.

in this proceeding, lead us to conclude that reasonable attribution rules, tailored to minimize any intrusive consequences with regard to the operations of CMRS licensees, will serve as an important factor in promoting competition among CMRS providers. We have concluded that, in the absence of such attribution rules, there is a risk that certain types of management agreements may undermine our efforts to foster a competitive marketplace for wireless carriers. In order to ensure that the CMRS marketplace is competitive, thus fostering economic growth, promoting diversity among CMRS service providers, and enabling optimum access to the Nation's information infrastructure, we have concluded that attribution rules calibrated to curb potential anticompetitive behavior are necessary.

25. We therefore have decided to establish the following attribution rules and requirements. First, any person, as defined in the Communications Act,[47] who manages the operations of a broadband PCS, cellular, or SMR licensee pursuant to a management agreement shall be considered to have an attributable interest in such licensee, for purposes of applying the spectrum cap limitations established in the Commission's Rules, if such person, under the terms of the agreement, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, (1) the nature or types of services offered by such licensee; (2) the terms upon which such services are offered; or (3) the prices charged for such services. We point out that this rule applies to a person acting as a manager and exercising such authority whether the authority is exercised in his or her capacity as a manager or in any other capacity, *e.g.*, lender. We believe that this attribution rule, which triggers attribution *only* in cases in which anticompetitive conduct can reasonably be viewed as an outgrowth of a management agreement, minimizes any restrictive impact upon business operations but also furthers our goal of promoting competition in the CMRS marketplace.

26. Second, in cases where a licensee claims that a manager does not have an attributable interest in the license as a result of a management agreement, it shall be the responsibility of the licensee, in response to any request made by the Commission or in response to any petition or complaint filed with the Commission, to demonstrate that the procedures and practices that are established by the terms of the management agreement have been implemented to insulate the manager effectively from involvement in any activities of the licensee through which the manager could exercise the authority described in the preceding paragraph.[48] For purposes of evaluating any such demonstration, we expect that it will not be sufficient for the licensee to show that the management agreement merely contains a disclaimer or other provision indicating that the manager does not have any such authority, if the agreement fails to include specified procedures and practices designed to prevent the exercise of such authority. In instances where a manager serves in a dual capacity, *e.g.*, manager and lender, licensees must demonstrate that the manager does not

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[47] Communications Act of 1934, 47 U.S.C. § 3(i).

[48] *See* note 59 *infra*.

exercise such authority in either capacity. Agreements entered into for the sole purpose of providing specialized technical products or services, such as telecommunications equipment, engineering services, network design services, legal and accounting services, billing services, construction, installation, repair as well as maintenance services or tariffed services such as high capacity "backhaul" links, shall not be subject to the requirements of this paragraph or the preceding paragraph. We do not believe that management agreements involving day-to-day technical and operational functions will result in attribution under our rules if the managing company does not engage in activities that determine or significantly influence prices or service offerings.

27. The principal purpose of the attribution requirements established in the preceding paragraphs is to ensure that aggregation of spectrum in a given geographic area does not result in anticompetitive influence over prices and service offerings. In order to accomplish this objective, we will take the following measures to achieve compliance with the attribution requirements. First, we note that the spectrum cap rules we have adopted[49] prohibit any person from having an attributable interest in CMRS licensees if the total amount of spectrum held by such licensees in the same geographic area would result in an aggregation of spectrum in excess of the limitations established in our rules.

28. Second, if a licensee enters into a management agreement that results in the manager under such agreement having attributable interests in licenses in excess of our spectrum cap limitations, then the licensee must take such actions as may be necessary to void the management agreement in a timely manner. Parties that currently have attributable management agreements may participate in PCS auctions on the condition that they bring such agreements that result in prohibited common interests into compliance with these rules within 90 days of a PCS license grant. The parties must also certify that they will comply with this requirement.[50] In the event that such an agreement went into effect, the licensee would be subject to appropriate enforcement actions by the Commission.[51]

C. Joint Marketing Arrangements

29. In the *Second Further Notice,* we sought comment on whether joint marketing agreements should constitute an attributable interest for the purpose of applying the spectrum

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[49] *See* 47 C.F.R. §§ 20.6, 24.204, 24.229(c).

[50] *See Broadband PCS Further Reconsideration Order,* at para. 33; Section 20.6(e) and Section 24.204(f) of the Commission's Rules. The certification shall be included in the initial application filed for any CMRS license that is subject to these attribution rules. In the case of CMRS applicants whose applications were filed before the effective date of these attribution requirements, any such applicant may submit the required certification not later than 30 days after such effective date.

[51] *See, e.g.*, Second Report and Order, 9 FCC Rcd at 1430-31.

aggregation caps. Under a joint marketing agreement, two or more CMRS providers would pool their resources to market their services to consumers. The opinion of most of the commenters is that these relationships are beneficial to both licensees and consumers. Motorola argues that joint marketing mechanisms allow small, independent operations to function cooperatively, thereby permitting them to obtain efficiencies otherwise reserved to larger competitors.[52] CTIA contends that marketing agreements can facilitate competition and customer acceptance of new PCS services by encouraging licensees to provide common features and services as a way of differentiating their service offerings from their competitors.[53] BellSouth also contends that joint marketing arrangements result in cost savings to service providers which can be passed on to consumers. It argues that the possible anticompetitive affects of such agreements can be dealt with by existing Commission rules and policies, and the antitrust laws.[54] GTE points out that because each licensee in a joint marketing arrangement always remains in control of its own facility, it is unlikely that such an arrangement would allow a competitor access to information that could be used for anticompetitive purposes.[55] Southwestern Bell urges the Commission to clarify that joint marketing arrangements do not encompass service mark and trademark licensing (*e.g.*, Cellular One, MobiLink) and interoperability agreements (*e.g.*, North American Cellular Network).[56] While it agrees that the types of joint marketing agreements listed by Southwestern Bell may have important procompetitive characteristics and should not be treated as attributable interests, the DOJ maintains that other joint marketing arrangements can raise anticompetitive concerns. According to the DOJ, the horizontal competitive concern in these agreements arises when one (or more) of the parties to the agreement controls a CMRS license in a market where, through the agreement, it also determines or

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[52] Motorola Comments at 10-11.

[53] CTIA Comments at 9.

[54] BellSouth Reply Comments at 8.

[55] GTE Comments at 10.

[56] Southwestern Bell Reply Comments at 8. Southwestern Bell points out that Cellular One and MobiLink are service marks used by the cellular block A and block B band carriers, respectively, to denote compliance with certain service quality standards, as well as certain customer features. As Vanguard explains, a carrier's right to use the service mark is strictly geographically delineated by private contract. Although there may be some incidental overlap in marketing, parties to the Cellular One service mark do not pool resources to sell their service to customers in a single market. Because only Block A carriers participate, there cannot be any meaningful overlap between service areas of parties to the Cellular One service mark agreement. Vanguard Comments at 3-4. Similarly, interoperability agreements denote to customers that automatic roaming and automatic call delivery will be available throughout the country from those carriers who are signatories. Southwestern Comments at 8.

significantly influences prices or service offerings for an additional license in that same market.

30. We agree with the DOJ that joint marketing arrangements can present anticompetitive concerns that can best be addressed by making marketing arrangements attributable interests where licensees enter into joint marketing if these agreements affect pricing or service offerings.[57] These interests will be attributed for purposes of the PCS aggregation limit, the cellular-PCS cross-ownership rules, and the CMRS spectrum cap.[58] The rule will apply to designated and non-designated entities alike. Although we recognize that there may be benefits and cost savings from joint marketing agreements, we are concerned that such arrangements could effectively create a single economic entity substantially restraining meaningful competition in a geographic area where a single entity has an attributable agreement with two or more CMRS licensees, or where multiple CMRS licensees are parties to a single agreement. The commenters failed to provide evidence to the contrary. It should be noted that like management agreements, joint marketing agreements are not prohibited, but merely attributable. Thus, a 30 MHz PCS licensee may, for example, enter into a joint marketing agreement with a 10 MHz PCS licensee within its service area.

31. As with management agreements, we have decided to establish the following attribution rules and requirements for licensees entering joint marketing agreements. First, any licensee who enters into a joint marketing arrangement with a broadband PCS, cellular, or SMR licensee shall be considered to have an attributable interest in such licensee, for purposes of applying the spectrum cap limitations established in the Commission's Rules, if such person, under the terms of the agreement, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence (1) the nature or types of services offered by such licensee; (2) the terms upon which such services are offered; or (3) the prices charged for such services. We believe that this attribution rule, which triggers attribution *only* in cases in which anticompetitive conduct can reasonably be viewed as an outgrowth of a joint marketing agreement, minimizes any restrictive impact upon business operations but also furthers our goal of promoting competition in the CMRS marketplace.

32. Second, it shall be the responsibility of a licensee with a joint marketing arrangement, in response to any request made by the Commission or in response to any

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[57] *See* 47 C.F.R. §§ 20.6 and 24.204.

[58] This rule is entirely consistent with the Commission's rules governing radio ownership and local "time brokerage," or joint programming arrangements where certain such arrangements are counted toward local and national multiple ownership rules. *See Revision* of *Radio Rules and Policies*, 7 FCC Rcd 2755, 2788-89 (1982), *on recon.* 7 FCC Rcd 6387, 6402 (1992); 47 C.F.R. § 73.3555(a)(2).

petition or complaint filed with the Commission, to demonstrate that the procedures and practices that are established by the terms of the joint marketing agreement have been implemented to insulate effectively either party to the agreement from involvement in any activities of either licensee through which either party could exercise the authority described in the preceding paragraph.[59] For purposes of evaluating any such demonstration, we expect that it will not be sufficient for either licensee to show that the joint marketing agreement merely contains a disclaimer or other provision indicating that the parties do not have any such authority, if the agreement fails to include specified procedures and practices designed to prevent the exercise of such authority.

33. If any licensee enters into a joint marketing agreement that results in either licensee under such agreement having attributable interests in excess of our spectrum cap limitations, then that licensee must take such actions as may be necessary to void the joint marketing agreement in a timely manner. If any licensees currently have attributable joint marketing agreements, they may participate in PCS auctions on the condition that they bring such agreements into compliance with these rules within 90 days of a PCS license grant. Licensees with such agreements must certify that they will comply with this requirement.[60] In the event that such an agreement went into effect, the licensee would be subject to appropriate enforcement actions by the Commission.[61]

34. We agree, however, with Southwestern, Vanguard and RCA that the joint marketing agreements that constitute attributable interests should not include service mark and trademark licensing agreements, interoperability agreements and similar arrangements. As Southwestern explains, these types of agreements do not involve licensees in the same geographic area and do not create the concerns over pricing in-region service offerings overall or sharing of marketing and customer information that might tend to lessen competition in wireless markets.

III. CONCLUSION

35. As stated above, resale agreements will not be considered an interest attributable to a reseller in the context of a PCS spectrum aggregation cap, PCS-cellular

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[59] We make clear that we will in no way condone frivolous complaints to the Commission that a specific management agreement or joint marketing agreement is in violation of the Commission's rules pursuant to this Order. Moreover, we emphasize that the Commission's initiation of an investigation into the allegations set forth in the complaint will not result in the automatic termination of the subject agreement or suspension of the construction or the operation of a licensee's facilities pending a Commission decision with respect to the complaint.

[60] *See* note 49, *supra.*

[61] *See* note 50, *supra.*

cross-ownership restrictions, or a general CMRS spectrum cap. Typically, resellers cannot either exercise control over the spectrum on which it provides service or reduce the amount of service provided over that spectrum. Management and joint marketing agreements, however, present other concerns. Because certain management agreements and joint marketing arrangements may have an adverse impact on competition, we have decided to treat as attributable agreements that give a party to the agreement the power to determine prices or service offerings for more than one licensee in the same geographic area. We believe that the inclusion of such interests as attributable will not delay the licensing of broadband PCS services or hamper the rapid deployment of PCS to the public. The adoption of clear, unambiguous rules will eliminate the need for burdensome review and reporting requirements. We believe that these attribution rules will serve to promote vigorous competition and deter anticompetitive behavior.

IV. PROCEDURAL MATTERS; ORDERING CLAUSES

36. The analysis pursuant to the Regulatory Flexibility Act of 1980 is contained in Appendix C.

37. Accordingly, IT IS ORDERED that the rule changes as specified in Appendix D ARE ADOPTED.

38. IT IS FURTHER ORDERED that the rule changes made to Part 20 of the Commission's Rules herein WILL BECOME EFFECTIVE on January 2, 1995. This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

39. IT IS FURTHER ORDERED that the rule changes made to Part 24 of the Commission's Rules herein WILL BECOME EFFECTIVE immediately upon publication in the Federal Register.[62] This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c),

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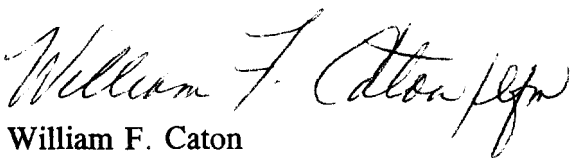
[62] Entities with attributable agreements may participate in broadband PCS auctions provided that they bring such agreements into compliance with Commission rules. The rule changes adopted herein provide all parties with greater certainty about the attribution requirements of our CMRS rules. These benefits will be compromised unless the rule changes become effective immediately upon publication in the Federal register, because the deadline for filing applications to participate in the initial broadband PCS auction is October 28, 1994. Thus, there is good cause to order the changes to take effect upon Federal Register publication. *See* 5 U.S.C. §§ 553(d)(1), (d)(3).

303(f), 303(g) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary

APPENDIX A

LIST OF PARTIES FILING COMMENTS

Party (and Short Title)

American Mobile Satellite Corporation (AMSC)

American Mobile Telecommunications Association, Inc. (AMTA)

Cellular Service, Inc. (CSI)

Cellular Telecommunications Industry Association (CTIA)

Columbia PCS, Inc. (Columbia)

Dial Page, Inc. (Dial Page)

GTE Service Corporation (GTE)

LCC, L.L.C. (LCC)

McCaw Cellular Communications (McCaw)

Motorola, Inc. (Motorola)

National Cellular Resellers Association (NCRA)

Nextel Communications, Inc. (Nextel)

NYNEX Corporation (NYNEX)

Pacific Bell Mobile Services (Pacific Bell)

PCC Management, Corp. (PCC)

PlusCom, Inc. (PlusCom)

Rural Cellular Association (RCA)

Simron, Inc. (Simron)

Southwestern Bell (Southwestern)

Vanguard Cellular Systems, Inc. (Vanguard)

APPENDIX B

LIST OF PARTIES FILING REPLY COMMENTS

BellSouth Corporation, Bell South Telecommunications, Inc., BellSouth Cellular Corp., and Mobile Communications Corporation of America (BellSouth)

Motorola, Inc. (Motorola)

Nextel Communications, Inc. (Nextel)

Pacific Bell Mobile Services (Pacific Bell)

Puerto Rico Telephone Company (PRTC)

The National Association of Black Owned Broadcasters, Inc. (NABOB)

The National Telephone Cooperative Association (NTCA)

Romgat Communication, L.P. (ROMGAT)

Simron, Inc.

Southwestern Bell Corporation

Sprint Corporation (Sprint)

EX PARTE COMMENTS FILED

The Department of Justice (DOJ)

Pacific Bell and Pacific Bell Mobile Services

APPENDIX C

Final Regulatory Flexibility Analysis

Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the *Second Further Notice of Proposed Rule Making* in GN Docket No. 93-252. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

A. Need for and Objective of Rules

1. This rule making proceeding was initiated to implement Sections 3(n) and 332 of the Communications Act of 1934, as amended. In prior orders, the Commission has adopted spectrum caps and cross-ownership rules to prevent excessive aggregation of spectrum. The goal of these limitations is to promote competition by ensuring that the aggregation of spectrum in a given geographic area does not result in anticompetitive influence over price or service offerings. The *Fourth Report and Order* in GN Docket No. 93-252 adopts attribution rules that make certain management agreements and joint marketing arrangements attributable interests for purposes of applying the Commission's spectrum cap rules. In the absence of such attribution rules, there is a risk that management agreements and joint marketing agreements may undermine our efforts to foster a competitive marketplace for wireless services.

B. Issues Raised by the Public in Response to the Initial Analysis

2. No comments were submitted specifically in response to the Initial Regulatory Flexibility Analysis.

C. Significant Alternatives Considered

3. The rules adopted in this *Order* are narrowly tailored to minimize any intrusive consequences with regard to the operations of CMRS licensees. The *Order* does not prohibit management or joint marketing agreements. It finds, however, that certain management or joint marketing agreements will be treated as creating attributable interests in the licensees for purposes of the Commission's spectrum cap limitations. The regulatory burdens we have established for all CMRS licensees, including small entities, are necessary to carry out our duties under the Communications Act of 1934, as amended. We will continue to examine alternatives in the future with objectives of eliminating unnecessary regulations and minimizing any significant impact on small entities. A copy of this *Order* will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

APPENDIX D

PART 20 - COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 continues to read as follows:

Authority: Secs. 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 20.6 is amended by adding a new Section 20.6(d)(9) and 20.6(d)(10) as follows:

* * * * *

(d) * * *

(9) Any person who manages the operations of a broadband PCS, cellular, or SMR licensee pursuant to a management agreement shall be considered to have an attributable interest in such licensee, if such person, or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, (1) the nature or types of services offered by such licensee; (2) the terms upon which such services are offered; or (3) the prices charged for such services.

(10) Any licensee or its affiliate who enters into a joint marketing arrangements with a broadband PCS, cellular, or SMR licensee, or its affiliate shall be considered to have an attributable interest, if such licensee, or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, (1) the nature or types of services offered by such licensee; (2) the terms upon which such services are offered; or (3) the prices charged for such services.

3. Section 24.204 is amended by adding a new Section 24.204(d)(2)(ix), 24.204(d)(2)(x) and by revising Section 24.204(f) as follows:

(d) * * *

(2) * * *

(ix) Any person who manages the operations of a broadband PCS or cellular licensee pursuant to a management agreement shall be considered to have an attributable interest in such licensee, if such person, or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, (1) the nature or types of services offered by such licensee; (2) the terms upon which such services are offered; or (3) the prices charged for such services.

(x) Any licensee who enters into a joint marketing arrangement with a broadband PCS or cellular licensee, or its affiliate, shall be considered to have an attributable interest, if such licensee has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, (1) the nature or types of services offered by such licensee; (2) the terms upon which such services are offered; or (3) the prices charged for such services.

* * * *

(f)* * *Provided, however, that these divestiture procedures shall be available only to: (i) parties with controlling or attributable ownership interests in cellular licenses where the CGSA(s) covers 20 percent or less of the PCS service area population; (ii) parties with attributable interests solely due to management agreements or joint marketing agreements; and (iii) parties with non-controlling attributable interests in cellular licenses, regardless of the degree to which the CGSA(s) covers the PCS service area population. * * *